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619 integrated within their families and the Tséligato's. And the surrounding society is none other than the Hellenic society to which the Sarakatsani belongings as Greeks.

128 Some of the groups enumerated are organized. They therefore present a special aspect which we shall examine separately. Taking into account the fact that all social life involves an economic system which rests on organization, we shall examine it in connection with the latter.

Finally, social organization being inconceivable without recourse to norms, prescriptions and models for behavior, we shall conclude this part with a study of law and morality among these nomads.

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CHAPTER ONE

THE SOCIAL UNITS IN SARAKATSANI LIFE

THE CONJUGAL FAMILY

594 582 [583] [595] The Sarakatsani conjugal family is always based on marriage. Concubinage and other forms of union are not permitted. Since our herders depend principally on the family, it is to be expected that a system or rules and principles would be in force and be applied both to the events that create the family (obstacles to marriage, choice of future husband or wife, betrothal, marriage) as well as to the unfolding of its life (relations between spouses, daily life, children, etc.).

[128] These rules constitute so many guide points; naturally the study of the conjugal family will take these as a point of departure; their sociological evaluation will thus be carried out at the same time.

582 Marriage regulation, the kinship system and its functions.

In general, marriage follows the rules of canon law and civil law (first Byzantine, then Hellenic).

582 671 However, these are not the only regulations. Marriage is likewise regulated by the customary law which derives from Sarakatsani society itself.

58 171 671 According to canon and civil law, which applies to all Greeks,

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58 171 691 therefore also to the Sarakatsani, marriage a) is always religious; b) it is precluded by collateral relationship up to the sixth degree (second degree cousins); c) it can be dissolved by divorce; d) a new marriage is legal.

Religious marriage and the obstacles imposed by kinship are likewise recognized in customary law. Divorce and remarriage are not.

582 691 Between these two laws, the official and the customary, there is no /126/ incompatibility, since the second is more strict than the first. However, the differences do not end here. That is to say, we must concern ourselves systematically and in detail with Sarakatsani marriage law.

582 Its first rule is ethnic endogamy in the sense that marriage is permitted only with Sarakatsani. Marriages with sedentary peasants, although very unusual, are tolerated.

582 186 [153] However, marriages with other nomads of the country, with above all, the Koutsovalaque are strictly forbidden. "If you marry a Koutsovalaque you risk catching leprosy," (1)

1. Hadjimitchali: A, I, p. 96.

the Sarakatsani say. This sanction, this threat, rather, which tradition holds up against every infraction shows very well the importance attributed by our nomads to this rule to endogamy which stands against any promiscuity of an ethnic order that risks bringing about a confusion between them and the Koutsovalaque /who are/ also nomads and sheepherders, and moreover, Latino speakers /Latinophones?/.

582 The second rule has to do with the prohibition of marriage between relatives. In fact, collateral blood relationship prevents marriage up to the eighth degree. This means that after four generations, that is to say, between the great-great-grandchildren of the same ancestor marriage [613] is permitted. Thus a lineage which, up to that degree, has followed an exogamous rule in relation to itself and consequently progressed by expanding through alliances, may from then on become endogamous and turn inward again.

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462 closer to consumption than production. Moreover, the very method of
342 construction, the interlacing of branches and flexible material, is
433 almost the same as that of weaving. It is in any case more nearly
562 related. The specialization of the women in the latter /193/ is a consequence of their skill in the former. The principle involved is therefore uniformly applied.

462 That is not all. All the activities and techniques entrusted
562 to the women presuppose activity on the part of the men. For they are
433 the ones who furnish the raw materials and manufacture the necessary tools and utensils--wool, cotton, dyes, loom, carding machine, or even flour, oil, cooking pots, knives, etc. The techo-economic competence of the women constitutes a sort of second stage in the techno-economic process in general, in which the group of men retain the intitiative and control.

462 Sarakatsani society decrees that, in this domain as in so many
562 others, the man, must keep for himself the role of absolute master.

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CHAPTER III

LAW IN SARAKATSANI SOCIETY

GENERAL ASPECTS

671 The legal system of the Sarakatsani is dominated by a dualism.
179 This statement means that this society uses two bodies of rules of a legal order.

The one, which is its own work, is Sarakatsani law strictly speaking.

The other comes from the Hellenic society that surrounds them. Since, as we have seen, our herders are not merely Sarakatsani, but also Greek, it is natural that Hellenic law also concerns them.

This dualism basically reflects the relations of a sociological order that exist between Sarakatsani society and non-Sarakatsani society, both included in the total society of the Hellenic Nation.

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Now, in order properly to understand the phenomena relevant to the legal life of our nomads, we must examine:

--Sarakatsani law;

--Hellenic law;

--the relationships that exist between the two;

--finally, the repercussions of these relationships on the social life of the Sarakatsani.

The systematic requirements of our research demand that we begin our analysis with the laws of surrounding society (which form the sort of legal atmosphere in which Sarakatsani law was born and has developed); next, that we examine the relationships of the two systems of law and the repercussions of these relationships on /196/ Sarakatsani life. This examination will culminate in a discussion of Sarakatsani law as such to which special attention will be paid.

Thus, the traits and functions of the latter will become clear and evident.

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In our introduction we stated that the appearance of the Sarakatsani coincided with the end of the Byzantine Empire.

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Inasmuch as our knowledge of the legal life of Hellenism during the Turkish occupation is now considerable, thanks to the masterful research of the Greek professor N. Pantazopoulos, (1)

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1. See particularly: Ἀπό τῆς Ἀγγίας Παραδόσεως εἰς τόν Ἀστ. Κάβδαν. — historian of law, we are in a position to follow closely the development of law among the Hellenes from the probable appearance of our nomads up to the present time.

This development had several phases which we shall review briefly.

After the fall of Constantinople (1453), Turkish law, public as well as private, replaced Byzantine law then in force among the Greeks. However, the sultan Mohammed II, anxious to conform to the rules of the Koran

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(chapter 5, 51) which allows all conquered peoples the right of extra-territoriality, and to exercise a policy of tolerance toward the institutions of the vanquished, (2) granted privileges to the Greek population.

2. A. Toynbee: Histoire, pp. 193-200, gives a good account of Ottoman administrative ideas.

The Ecumenical Patriarch and the Orthodox Church (the only organization of the Hellenes which survived the disaster) thenceforth assumed the legal functions of the Hellenic nation and represented an authority to which the Christians could turn in order to settle their dispates.

However, this new ecclesiastical authority, at any rate during the first century of occupation, remained more theoretical than actual: first, because no method was provided for carrying out the verdicts rendered; second, because it dealt chiefly with questions pertaining to family and inheritance law, hence its domain was very limited.

On the other hand, during this same period, Turkish law required that all other questions be brought before the Turkish tribunals. Moreover, in order that a certain number of acts and /197/ covenants concluded between Christians by legally valid, they were obliged to take on the form provided by Turkish law.

Nonetheless, injured patriotism and distrust of their occupiers on the part of the resident Greeks, lax and inefficient organization of the Ottoman administration, finally the establishment of excommunication by the Church in the form of sanctions against those who refused to conform to its verdicts and who preferred to appeal to the legal process of the infidel enemies were sufficient motives for the Greek population to turn more and more to ecclesiastical law. And so the powers of the latter expended in time.

The law applied, moreover, continued to be the Byzantine law, included in the legislation of the Emperors, as well as the Cannon law of the Orthodox Church.

Parallel with this movement another took shape. The development of a

S 671 175 /197 cont./ local auto-administration of Greeks in region enjoying local privileges
G 671 175 resulted in the creation of civil tribunals whose verdicts were rendered according to the rules of locally established customary law as well as the creation of a public law which was their own. (3)

3. Cf. N. ΠΑΝΤΑΖΟΠΟΥΛΟΥ : « Τοπικαὶ περὶ τῆς δικαιοσύνης τῶν κριτηρίων. — N. ΜΟΣΧΟΒΑΚΗ : Τὸ Ἑλληνικὸν Δημόσιον Δίκαιον. — Δ. ΤΖΟΡΤΖΟΓΛΟΥ : « Ἡ περὶ Γεωργικὰ τῆς Θεσσαλίας ». — G. Tavaxinos : *La notion juridique de l'indépendance*.

S 671 171 A third movement must still be added: justice administered by arbiters proposed and accepted by the parties concerned.

G 671 175 692 As early as 1600 the Turks had begun to recognize ecclesiastical law, the law of tribunals and finally the law of arbiters in the sense that the Sultan sometimes forbade the Turkish magistrates to interfere in matters already judged by the Greeks (clergy, popular judges, arbiters), and sometimes compelled the Turkish authorities to carry out by armed force the verdicts pronounced by the Hellenes. (4)

4. See Verat: (Decree) of the sultan Achmet A. in:
M. Gedeon: Μάκαρος Γράμματα, Τεσσαρακ.

S 671 175 Now the Sarakatsani of this period, considered as a Greek, was immersed in this multiplicity of laws: Turkish law (public and private) first of all; then Hellenic law applied by the Church (Byzantine law and canon law); customary law(public and private) coming from the privileged communities and differing according to localities; finally, the law applied by arbiters on the basis of their consciences (equity and common sense).

/198/ This situation lasted until the liberation of the country and the creation of the Hellenic State.

S 671 175 At this time (1835) a decree was promulgated to the effect that the official private law was no different from Byzantine law and also that the rules of custom would stand as laws. As a result, the State tribunals
G 671 175 had to pronounce their verdicts not only according to the rules of actual law, but also according to the rules imposed by local custom, provided
[692] the latter did not run counter to the rules of law strictly speaking.

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But at that time the liberation of Greece was only partial, the Greco-Turkish frontier being in Thessaly. The introduction of this law of the Hellenic State throughout the entire country was therefore gradual and followed the rhythm of the liberation of the different regions of the north (Thessaly in 1881, Macedonia and Epirus in 1912, Thrace in 1920), as was its penetration into Sarakatsani life, since the geographic center of the migrations of these nomads was in the northern provinces.

Finally, in 1946, the Civil Code of modern Greece was put into effect. This code no longer recognized the customary law which thereafter was not valid in the eyes of the courts and the administration of the country. But to make up for it, this same code recognized the principle of Roman law pacta sunt servanda. It is therefore obvious that if certain rules of customary law are explicitly included in all kinds of agreements they may be recognized by the courts as valid insofar, of course, as the clauses based on these rules do not run counter to the law strictly speaking.

Here we have a concrete picture, very complex to be sure, of what we designated at the beginning of this section as "Hellenic law issuing from the society surrounding the Sarakatsani."

We should therefore now go on to the study of the influence which this law exerted, over time, on the social life and the law of our herders.

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During the first period, that is to say during the Turkish occupation, the Sarakatsani, sheltered and isolated in the mountains, remained relatively safe, so to speak, from the legal complex of the period.

/199/ Turkish public law could but rarely affect it, chiefly because of the inefficiency of the Turkish administration which had nothing in common with the organization of modern states.

Moreover, resorting to the law of the conqueror in questions of a private nature is almost unthinkable for the Sarakatsani. His unsubjugated and resistance-like behavior rules out such an eventuality. Besides,

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671 the Church is always there to excommunicate a traitor.
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Thus we can say that Turkish law, public or private, exerted only a very relative influence on our herders.

671 Public law of privileged communities does not concern the Sarakatsani,
629 for they have never been part of these. When commercial or simple
692 economic transactions cause differences they can be solved by recourse to arbiters.

As we shall see, the Sarakatsani very much prefer, above all others, this type of legal process which goes back to a very distant past. (5)

[113] 5. See J. Walter Jones: The Law and Legal Theory of the Greeks /cited in English/, pp. 130-133, citing also Harell: Public Arbitration in Athenian Law /cited in English/, pp. 1-42.

671 If, in spite of all, they are obliged to apply to local Hellenic
199 justice, customs remain valid before the latter. Sarakatsani customs, too, can thus be enforced.

Now it is certain that the Sarakatsani need comply only occasionally with local laws. If one remembers, in particular, that the disagreements brought about by transactions with the outside appear only rarely, that the sector "trade" covers only a very small part of Sarakatsani economic life, and finally that this sector touches only very superficially their social life in general, one will understand that even in cases where the law, either ecclesiastical or local, ultimately intervenes, this intervention cannot cause any important repercussions in the social sphere.

671 It follows therefore that Sarakatsani law as such has had every
[678] opportunity to develop and above all to develop autonomously during this period.

This in only a negative aspect result of the way external law functions. But there is more, and it is suitable to throw light on the positive results as well.

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G 671 /200/ As a matter of fact, the law that developed during the Turkish occupation in the local communities is a law of cooperation whereas Byzantine law, inspired by Roman law, is dominated by individualism. The Greeks of this period grouped themselves with all kinds of associations (economic, religious, political and, though this may seem strange under an occupation, even military). (6)

6. N. Pantazopoulos: «[illegible]» with a copious bibliography.

Local law was adapted to the needs of this collective organization of life. S 671 177 It should therefore not be astonishing that Sarakatsani law, which also favors cooperation, should have been inspired by the model of external law, and that it should have been formed on the basis of the same principles, despite its own peculiarities. However, this is merely a hypothesis, S [114] [114] absolute verification of which is impossible at the moment for lack of data.

Let us go on now to the examination of this same problem but within G 671 175 the framework of the second period:

When the Hellenic kingdom was established the public law of the new S [671] [177] state, though valid for and applicable to all Greeks and hence also to the Sarakatsani did not have much opportunity to interfere in their lives.

The occupation and the war of independence left the country completely G 648 729 disorganized and devoid of any framework and any public service. It took many years before services were created, before archives and registers were set up dealing with the population - even the sedentary population. One can imagine the difficulties administrative mechanism of the state.

It is only very recently, in 1938, as we have seen, that they have G 641 all submitted in practice to civic life, to the obligation of military service, to taxes, etc.

Between these two date (1835-1938) the influence of public law on G 671 their lives, very minor in the beginning and very strong toward the end,

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has developed gradually and in step with the organization of the administration.

However, the actual and practical introduction of public law among the /201/ Sarakatsani was disastrous to their way of life. The obligatory contacts with the sedentary population (army, dependence on villages), participation in political activity (elections, participation in local administration), the social policy of the State (integration of the Sarakatsani into agricultural cooperatives, concession of building sites, etc.), the legal control of their lives (application of the penal law, application of rules of public order), etc., have created conditions altogether unfavorable to their culture. Moreover, to the extent that our herders became legally villagers and found themselves involved in relationships and situations to which public law was applicable, they were obliged to conform to it and to adopt arrangements issuing from official private law.

Now the latter was also disastrous for Sarakatsani life, because it was promulgated, not in terms of their kind of life or of other kinds of traditional life that existed in the country, but according to principles of legal science formulated by lawyers, hence by technicians, who more often preferred faultless scientific constructions to what popular opinio necessitatis had developed in the course of centuries.

In this leveling and colorless juridical ambience Sarakatsani law has no chance to survive. Thus, the legal dualism of which we spoke at the beginning is yielding little by little to a monism, that of official law, public as well as private.

The day when this monism will be generally imposed is not far off. And that very day will sound the knell of the Sarakatsani, as such, since that law is deeply grafted to social reality.

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671 The preceding account is based entirely on the presupposition that the Sarakatsani have a law which is their own. Thus our task at present is to discover this law, to describe it, to stress its peculiarities, in a word, to establish its existence and its limits.

/202/ SARAKATSANI LAW STRICTLY SPEAKING

IN SEARCH OF THE CRITERIA FOR CLASSIFICATION AND DIFFERENTIATION

The only truly legal manifestations that we find when we examine Sarakatsani life are the obstacles to marriage, the prohibition against sexual relations outside marriage, the contract with the Tseligas, arbitration, and finally crimes and misdemeanors.

However, are these truly matters of law? And if so, must one conclude from them that the legal life of the Sarakatsani is limited to these? Or must one rather concede, along with certain theorists, that the non-existence of courts and organized forces for the application of sentences shows that these herders are without any law? (7)

(113) 7. See W. Seagle: The quest for law/cited in English/, pp. 34, 60-69.

Or, finally, must we, along with other theorists, accept the opposite opinion which holds that our nomads have law, since they have customs, and that the totality of their customs represents the law of the society? (8)

(113) 8. See E. Sidney Hartland: Primitive Law/cited in English/, p. 5. "Primitive law is in truth the totality of customs of the tribe"/cited in English/.

These alternatives show very well that in order to be able to adopt a position we must try to explore the life of the Sarakatsani from some workable criteria.

The general theory of law offers several methods of approach to legal matters, based on the characteristics of the latter, which we hereby

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enumerate and evaluate as distinguishing criteria.

First, each point of law has a normative character. However, since norms derive from the total of cultural achievements, this critierion cannot be used by itself.

It is necessary also to consider the source of the norm and its form. If it arises from a body having legal functions and is expressed in a form that is defined and recognized in advance, one may conclude that the norm in case is a matter of law. However, this procedure is valid only for societies that have specialized bodies /203/ entrusted with legal powers, (9)

9. Modern societies are not the only ones to have bodies of this kind. They are also found in ancient and archaic societies. The codes of Hamurabi, of Zaleucos at Locris, of Charondas at Catane and of Androdamas of Rhegion (Aristotle: Politics II, 9,5,9) in antiquity, and the descriptions of J. Vanhove: Essai du droit coutumier du Ruanda and of J. Peristianis: La vie et le droit coutumier des Kipsigis du Kenya, for some archaic societies constitute some examples.

and fundamental rules determining in advance the form of laws. Moreover, in these same societies this process is not applicable if one wishes to discover spontaneous law. (10)

10. On the idea of spontaneous law: E. Ehrlich: Grundlegung der Soziologie des Rechts, p. 399 f.-- G. Gurvitch: Elements de Sociologie juridique, pp. 91, 175-78, as well as his criticism of Ehrlich in his Traité, pp. 184-187, vol. II.

Since Sarakatsani society lacks bodies of this kind (arbitration being the exception), this criterion is not applicable.

Next, one may observe the content of the norm. When it includes bilateral or unilateral obligations it is accepted as a norm of law. (11)

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11. See Br. Malinowski: Moeurs et coutumes des Mélanésiens p. 42.--G. Gurvitch: Ibid., p. 189.--A.R. Radcliffe-Brown: Introduction, p. 13.

However, there are liberalities or "options" determined by law, (12)

12. The gift. The paternal consent in case of marriage.

and even laws which create bonds, not only between individuals but also between an individual and a thing. (13)

13. Rights in rem.

Finally, even bilateral and unilateral obligations do not all necessarily derive from law. Something more is thus required.

The source of the norm represents another element meriting observation. If it is linked with "the idea of justice," with "what is just," "what is approved," (14) etc., it is very probable, though not certain, that the

14. See M. Mauss: Manuel d'Ethnographie p. 112.--G. Gurvitch: Ibid, p. 189.--C. Van Vollenhoven: Het Adatrecht van Nederlandsh Indië, /Custom Law of the Dutch Indies/ etc.

norm in question is a norm of law, since the same ideas apply equally to morality, religion, etiquette, (15) etc. By itself, this source does not

15. On the idea of etiquette see A.R. Radcliffe-Brown: Ibid., p. 13.

constitute a sufficient criterion to distinguish law from other norms. For more clarity let us add that, although law is invoked largely to protect material interests, thus assuming a utilitarian character, its utilitarianism is always expressed in terms of the ideas that we have just mentioned.

The aim and the function of the point examined represent another way to look at law. For the aim of the latter is /204/ to protect social life from conflicts and disorder, and its function resides precisely in the realization of this aim. However, one also finds both this aim and this function in other norms. Nevertheless, one must recognize that

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121 671 183 legal norms are much more efficient and dynamic in resolving states of conflict than other types of norms, thanks to their means of persuasion. Thus, we come to the following point.

The distinguishing factor of law may also come from the social guarantee (16) which accompanies it and which is expressed in sanction and coercion. Law cannot live without this guarantee, at the risk of becoming a dead letter. There is therefore no doubt: this is indeed the essence of law, socially speaking. (17) Other norms also have ways of being enforced. If these ways fail, the value and nature of the content of the norm are not affected. On the other hand, if law is deprived of all means of enforcement, it changes its character, it becomes morality, usage, incentive, etc. It is no longer law.

16. According to the apt terminology of G. Gurvitch: Ibid., p. 189.

17. With some exceptions of which we shall speak farther on, all modern legal theorists or ethnologists seem to agree. Herewith a sample of the large bibliography of law on the subject: P. Roubier: Théorie générale du droit, p. 25.--R. Monier and others: Histoire des Institutions, p. 14.--B.N.Cardozo: The growth of the law/cited in English/, p. 52.--H. Kelsen: Théorie pure du droit, p. 61.--E. Durkheim: De la division du travail social p. 33-34.--R. Thurnwald: Die Menschliche Gesellschaft, vol. V, p. 2-4.--R. Pound: Sociologie du droit, p. 306.--E.A. Hoebel: The Law of primitive man/cited in English/, p. 26 etc.

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121 671 Therefore sanction and coercion validate law and reinforce the other criteria indicated by clearing them of all ambiguity and all misunderstanding when they coexist with these.

Precise details on this point will be given later on. We shall show that sometimes law is applied by direct coercion which means that

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121 the presence of agents of law forces people to conform to it when no
671 infraction has been committed (and before such an infraction). Coercion isolated from sanction, therefore constitutes one of the criteria of law.

However, although a social guarantee represents the chief criterion of the law, this criterion is utilizable only in combination with the totality of the criteria mentioned. For constraint, whatever its form, is not necessarily linked to law.

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/205/ Now, somewhat anticipating our conclusion, we shall state immediately that the application of these criteria shows that the Sarakatsani have law, much more rich and complicated than appearances indicate, and that this law bears the imprint of the originality of their lives.

671 We propose now, for the convenience of the analysis, to present
128 first the totality of the disclosed rules and principles, classified, not according to the classificatory criteria of evolved laws inadequate in the case that concerns us, (18)

18. See J. Lips: Government, chap. X, p. 487.--O.W. Holmes: cited by Hoebel, ibid., p. 20: "The past gives us our vocabulary and fixes the limits of our imagination." /cited in English/

but according to the issues on which these rules are based. We shall make two subdivision: one devoted to non-criminal law and the other to criminal law. This distinction is based on what the Sarakatsani themselves say, although non-conformity to non-criminal law carries punishments and thus resembles penal law. Before going on to the second subdivision we shall try to show that everything we consider law truly possesses this character. For criminal law, this problem does not arise, the punishment bearing out the nature of the relevant rules.

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671 [128] We shall conclude with certain critical reflections and an appreciation of Sarakatsani law.

Non-Criminal Law

Rules of law concerning family life.

Thanks to the detailed study of marriage and the family among the Sarakatsani, the corresponding laws are well known to us.

The rules of betrothal (the societal control of future spouses, the consent of the parents and the solemn confirmation by the exchange of gifts), the obstacles to marriage, kinship and its forms, the obedience of the wife and her protection, the internal hierarchy of the family, the legitimization of descendents (control, formal acceptance), conjugal fidelity and the widowed state, co-ownership of the patrimony, the shared business, the types management and internal organization of the extended family, the societal control of income, its distribution and accumulation, the hierarchy within the extended family, the right to separate from it, /206/ finally inheritance rights constitute so many issues for which legal regulation is required, as we have emphasized in the corresponding sections.

671 429 768 602 If the children are minors at the death of their father, a family council consisting of the nearest male relatives in the paternal as well as the maternal line undertake their guardianship and the management of their patrimony.

Although this principle is always valid, the guardianship is, in fact, almost exclusively exercised by a single individual, the nearest relative of the father, preferably his brother. The relatives of the father who take part in the family council are in reality more influential than the maternal relatives. The participation of the latter [494] [596] remains occasional, for it is necessary that they belong to the same Tséligato as the paternal relatives, or that the respective Tséligatos of the two parties be neighbors.

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671 768 562 429 (602) However, in view of the fact that the woman is considered a minor in the Sarakatsani family, the problem of a "quasi-guardian" of the widow arises in a case where the children are also minors or if there are no children. The widow is then placed under the protection, economic as well as social, of the relatives of her husband and continues to be part of their family.

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671 A general idea of the law bearing on family matters having thus been established, we must now examine some particular aspects.

As one moves away from purely familial relationships to those of predominantly economic interests, one passes from rules of a strict nature to more permissive rules.

671 593 Everything that pertains to the moral aspect of the family assumes the form of strict law. (19)

19. This family law is simply the law defining the situation the condition (the "legal status" of jurists) of each member of the family and social group. Its rigid character derives thus from its nature and from the social function of the latter. See analogous concepts in: G. Davy: La foi jurée, p. 371.

Everything that pertains to the management and the utilization of wealth allows arrangements according to the wishes of the persons concerned. Though no deviation from what is prescribed is tolerated in a marriage arrangement, in the regulation of the members of the family or their hierarchy, /207/ the distribution of income or its hoarding, co-ownership or co-exploitation may assume whatever forms and modalities the parties decide upon.

671 593 428 The only exception has to do with inheritance, for a father never has the right to /arrange for/ the disposal of his goods after his death otherwise than as prescribed by custom. Wills are unknown. Now this

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671 573 [428] exception is quite understandable when one remembers that the inherited share forms the foundation for the future family of the inheritor and thus relates directly to the world of family values, to the world of the "family law."

In the second place, certain strict regulations demand formal application. The consent of the father to the betrothal and the marriage, or the legitimacy of his children must be manifested publicly and in accordance with a definite procedure, as we know. On the other hand, this solemnity and this formality are not demanded in other instances.

Rules of law relating to the Tséligato.

494 695 671 If one examines the possible content of the contract (described in Part III of the preceding chapter) which the participants make with the Tséligas, as well as all the rules bearing on its inner functioning, one may state:

First, that the contractual arrangements follow more informal rules. Custom is always there to guide the contracting parties and indicate to them the course to follow, the effectiveness of which time-honored experience guarantees.

Second, that the only rules which seem to be of a strict character are those which prescribe obedience to the head and solidarity among the participants (common defense against tresspassing and against all kinds of threats, etc.).

This distinction is justified. By definition economic relations demand a relatively flexible legal support in keeping with the nature of this kind of activity. On the other hand, the necessary homogeneity and safety of all demand absolute conformity to the corresponding rules.

However, neither in the first case nor in the second is formality demanded or a special form of expression of willingness required.

/208/ Finally, the contractual character of these relations leaves a great deal of leeway to individuals as sources of law, and to their

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initiative, which nonetheless develops in the context of Sarakatsani society and its cultural system.

The agents of ajudication, of sanction and coercion.

The elements of the problem: daily life and therefore all the questions relating to marriage, kinship and the functioning of the family, as well as the removal of the head, the checking of accounts of the family management and of the Tsóligato, claims and quarrels between members and the Tsóligas, the settling of various questions pertaining to guardianship, the division of an inheritance and so forth, create and represent numerous cases in which conflicts and litigations may arise.

Now all these questions must be solved one way or another.

Though the agents of ajudication are multiple they are not always obvious. The same is true for the agents of sanction and coercion who are very often identical with the former.

In our effort to determine them we note first of all that the only official, hence visible tribunal that the Sarakatsani are acquainted with is that of arbiters.

Of course, an appeal to the official law of the surrounding society is always possible, but the Sarakatsani do not have recourse to it. (20)

20. This appeal would constitute a violation of the principle of isolation from the surrounding society, of which the Sarakatsani are very jealous.

If the litigation concerns family questions and disagreements between members of the same family, the arbiters are recruited by the parties concerned from among the oldest relatives (uncles, for example).

If the dispute is between strangers (members of the Tsóligato and the head, for example), each of the parties proposes as arbiter one or two Tsóligas.

The sentence, always binding and without appeal, from the viewpoint is formulated and pronounced according to what is good and fair to

/214 cont./

626 627 692 differ from what we call "sanctions of ethnic opinion or simple disparagement?" (31)

31. In the words of P. Fauconnet: La responsibilité, p. 12.

Why should we accept the fact that this same mechanism derives from law and not from the mechanism of enforcement common to all social regulations?

The reply to these two questions is the same. It is the absence of any possibility of escape, the need for all individuals to conform absolutely, the strictness of obligation which differentiates the facts described from all other kinds of sanctions. There is also the nature of the "authority" which underlies these rules and which is clearly distinguished from that of other regulations.

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627 692 Recourse to arbitration is infrequent. This does not mean that disputes do not arise, but merely that in addition to arbitration there are other procedures leading to their settlement. These are adjudication by the family, the Tséligato and Sarakatsani society, of which we have spoken briefly when pointing out that these entities have a voice in the disputes.

Now their comments in cases of conflict may, in a way, take on the force of law and commit the persons concerned to follow a definite conduct which represents the solution of the conflict.

/215/ Their means of action are the same as those that give sanction to the decision of arbiters. However, although in the latter case the groups act in support of an arbitrated sentence, when they give their opinion they are acting on their own account.

181 691 182 That is not all. The observer of Sarakatsani life is often struck by the conformism of our herders. They follow, or at any rate they seem to follow, to the letter, all the regulations derived from their law--which brings us back to the statements of Rivers and Hartland cited above. This fact is very significant. For it shows another legal function of the

/215 cont./

181 groups of which we are speaking. If the latter are capable of solving
671 actual overt cases, they are equally capable of preventing potential con-
182 flicts. We believe that here is a phenomenon of major importance and /one that is/ very characteristic of Sarakatsani society and culture.

As a matter of fact, the persons involved, faced with a concrete case, know in advance the behavior they must follow, and this for two reasons. The rules of custom are known to them. Whereas in our societies law is obliged to resort to the assumption that "no one is supposed to be ignorant of the law," in traditional societies the law is part of everyday experience. (32)

32. M. Mauss: Manuel, "the intimacy of law," p. 110.

In the second place, even in case a rule does not exist--and it might then be necessary to apply a spontaneous law for the purpose--the interested parties are in a position to foresee the decision of society. Moreover, these same individuals are perfectly conscious of the fact that if they should act contrary to these expectations, they would be facing the responses of their society which would ultimately prevail. They therefore adjust their behavior accordingly. Of course, all this goes on silently. The distress and drama that this state of affairs provokes never ruffles the surface of phenomena. The observer believes there is an automatic conformism which in fact is constantly developing and which basically maintains the life style of our herders.

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627 However, the question of whether individuals actually adjudicate by
686 also applying at a sanction /216/ still remains open. By referring to
689 the concrete cases of their activity that we have judged to be legal, and examining them in the light of our preceding developments, we can reply in the affirmative. The dismissal of participants by the Tséligas, at any time, the rift in the family when the head is deemed disloyal, the lack of cooperation with a dishonest Tséligas, constitute true punishments,

/222 cont./

685 Trespassing on their pastures.

The Sarakatsani use force, often armed, to repulse all those who try to trespass on the pastures they have leased.

It is concern for the defense of their interests, indeed their means of subsistence, that prompts them to react in this way; futhermore, they have no other means. Since the danger is to the group, they must face it as a group, the young men constituting the striking force.

683 626 Calumny and defamation.

Those who commit this misdemeanor incur public contempt. Moreover, a man who lets himself be influenced by women's gossip likewise becomes an object of derision.

This contempt is not only constraint of a moral order, but a veritable punishment because it has the same effect as the social disapproval of recalcitrants. We have described the efficacy nature of that sanction in connection with arbitration.

* * * *

671 There remains for us to systematize all the foregoing findings before closing this chapter.

/223/ SYSTEMATIC AND CRITICAL REFLECTIONS ON SARAKATSANI LAW

The sources of Sarakatsani law are custom, equity and common sense. However: first, though some customs are exclusively legal and therefore identifiable as such, there are others that are polyvalent, whose legal aspects intermingles with other aspects; second, common sense and equity are results whose components derive at one and the same time from legal, moral, religious, mythical or rational judgments--in short, from the entire Sarakatsani cultural system which, at that moment, assumes a legal qualifications and functions. (34)

(113) 34. Similar reflections are to be found in several works, for example Sir. P. Vinogradoff: Custom and Right /cited in English/, p. 21.--René Hubert: Science du Droit, p. 51.--M. Radin: La censure des coutumes , p. 90-91.--J. Poirier:

/223 cont./

671 [113] L'originalité des droits coutumiers, p. 487.--
P. Roubier: Théorie générale du Droit, p. 163 f.,
etc.

For it should be emphasized that the law of the Saraktsani--this aspect of social life which Malinowski (35) has judiciously called "the

35. Ibid., p. 45.

aspect of legality" --must be regarded as a sphere only half of which is visible. To define it, therefore, requires a task of specific identification. This remark applies to all its manifestations.

The sources of this law are: the conjugal family and the extended family, the Tséligato, Sarakatsani society, arbiters and individuals.

Under the term "source" we include the groups and individuals whose activity shows creativity in matters of law (setting forth rules to be followed, adjudication, sanction, coercion).

[596] Seen from the angle of legislation, the most notable of these sources is the extended family. For from it emanate all the rules concerning family life, social organization, the system of ownership and the manner of economic exploitation.

[594] [596] The conjugal family is regulated in terms of the life of the extended family and according to its authority.

[474] [596] The Tséligato develops a zone of legislative activity which is peculiar to it and is limited to relations between the Tséligas and the /224/ participants; for all the rest it has recourse to regulations pertaining to the extended family.

Sarakatsani society, as a total unit, merely does not issue them.

[692] [596] The arbiters, as legislators, enjoy an autonomy which is only apparent, since the rules that they apply must be compatible with the general application of laws, wherein the extended family plays a primary role, as well as with the Sarakatsani cultural system which is, above all, the work of this type of family.

671 596 594 534 692

/224 cont./

These groups create general rules by establishing custom and by issuing spontaneous and ad hoc rules for cases not provided for, while the arbiters introduce (always as legislators) individualized, spontaneous and ad hoc rules.

Individuals do not participate in the legislative function.

671 676

The agents of Sarakatsani law are the same as its sources. However, they also include individuals, or rather specific individuals, according to their rank and status. Sources and individuals become agents the moment they apply established or spontaneous law by particularizing it in various concrete cases. However, aside from the arbiters and the individuals in question, other agents are not apparent because they are not specialized, their legal functions merging with their other functions.

The moment law is applied, the question of responsibility arises quite naturally, It falls equally on groups and individuals, depending on the case. The strong social integration of the Sarakatsani does not negate the responsibility of individuals. The latter see themselves called upon to assume it should the occasion arise.

681

As for sanction, this is generally part of the reaction which each society manifests with respect to certain behavior that does not conform to its principles. It therefore constitutes above all a social manifestation. Coercion presents the same character. It involves also another part of these same reactions.

Theoretically speaking, sanctions are divided into: first, those provided for, subdivided depending on whether they are organized and unorganized /sanctions/, applied by special agents or not; /225/ second, spontaneous /sanctions/ that is to say, relevant to a judgment "after the event" and set forth "from a feeling of what is good and fair." These can likewise be divided into organized or non-organized; 3rd, /sanctions/ directly imposed by physical force; 4th, /sanctions/ expressed in criticism or by attitudes conveyed in the behavior of the members of the corresponding society toward offenders.

/225 cont./

681 Among the Sarakatsani, sanctions and coercion, always social, can only exceptionally be organized (groups when they impose isolation, individuals according to the instances enumerated), since, ordinarily, there are no special agents or coercion. They /i.e. sanction and coercion/ are either provided for (customs) or spontaneous, and they are only exceptionally imposed directly by physical force, the case of sanction of crimes and misdemeanors constituting a peculiarity which we must consider separately.

But there is more. Though sanction is the result of an infraction and strikes the one who has committed it, though coercion is a function that assures the application of sanction, though, finally, both sanction and coercion always go together in evolved societies, coercion never being thought of independently from sanction, among the Sarakatsani coercion may intervene and act without any sanction having been formulated beforehand. Its aim, in 671 that case, is no longer the application of the sanction, but direct applica- 681 tion of the rules of law. It is a little as though in our societies the police directly required citizens to conform to the rules of law without their first having passed through the channel of adjudication, of sentence and of sanction. As a result, and we must emphasize this very specifically, the sanctions listed are directed more toward prevention than toward repression.

Sarakatsani society prefers to protect itself in advance of any disorder by an appropriate and preventive maintenance of its law, rather than having to put right explosive and dangerous situations. However, when despite all, the latter flair up, Sarakatsani society does not hesitate to suppress them by resorting to sanctions of a penal order, physically inflicted. These sanctions are strictly applied, depending on the nature of the disturbance.

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/226/ We should now like to draw attention to the fact that sanction and coercion are most often <u>disguised</u> in Sarakatsani law.

This phenomenon, represents one of the chief characteristics of Sarakatsani society. Quite apart from its importance in the life of the society, we believe that it can in addition contribute considerably to the theoretical

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and anthropological approach to laws other than those with which our advanced societies are familiar.

This phenomenon is not entirely unknown to theorists. But if some of them have had an inkling of it, no one, to our knowledge, has treated it in clear terms. (36)

36. We have mentioned some of these authors in connection with some definite point. We shall take up their theories in their broad aspects, our previous remarks being an integral part of what follows.

In order to introduce the discussion, it will be well to start with certain comments on the famous work of B. Malinowski: Crime and Custom in Savage Society /cited in English/ (37)

37. Our questions refer to a French translation included in: Moeurs et Coutumes des Mélanésiens, to which our quotations refer.

(1926). The publication of this work, in addition to the influence that it has subsequently had on the anthropological theory of law, has made it possible to state the problem correctly.

What Malinowski does is to protest against the interpretations dominated by the ideas of L. Morgan--those of "Bachofen, of Post, of Bernoft, of Kohler and others who were grouped around the periodical Zeitschrift fur vergleichende Rechtswissenschaft" (p. 10), those which are found again "in the works of the French school of Durkheim, in most American and German works and in some English works" (p. 11). "Basic to all these ideas," he says, "was the postulate that in primitive societies the individual is totally dominated by the group, the horde, the clan or the tribe, that he obeys the commands of his community...with servile passivity, so to speak, bewitched" (p. 11).

He also protests against E. Sidney Hartland and Dr. Rivers, cited above, who speak of an "unconscious and intuitive regulation of social life...

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121 closely bound up with primitive communism" (p. 14), and against Hobhouse who
671 states that "if we understand by legislation a totality of rules imposed by an authority to which one is not bound by personal ties of /227/ kinship or friendship, we are obliged to state that such an institution is incompatable with the social organization of savages" (Morals in Evolution/ cited in English/, 1915, p. 73, quoted by Malinowski, ibid., p. 15). And Malinowski asks himself: "Is there not, at least as far as certain rules are concerned, a mechanism of constraint, perhaps not imposed by an external authority but based on actual motives and interests and on complex feeling?" (p. 15). And a little farther on he adds: "The extreme difficulty of the problem is due... to the very complex and diffuse character of the forces that constitute primitive law" (p. 17).

Malinowski believes that he finds the solution of this problem in the "principle of reciprocity," the "principle of do ut des /I give so that you may give/ which plays a dominant role in tribal life" (p. 82). For him, "the rights of the chief over ordinary people, those of the husband over his wife or of parents over their children are not exerted arbitrarily and in a unilateral fashion, but in conformity with clearly defined rules and are made up of successions of strictly reciprocated services" (p. 37--italics mine). This is all the more true of exchanges of an economic order, called "kula" (p. 24). The whole rests on the symmetry of structure which "constitutes the indispensable basis of all savage society" (p. 24). If the individual conforms absolutely to this "give and take" which extends throughout all social life, recompense awaits him at the end in the form of economic benefits or the augmentation of his prestige. If he does not conform to it "it will not be long before he is banished from social and economic life and he knows this perfectly well" (p. 34). In sum, the "civil" laws, the positive laws which govern all phases of tribal life are therefore made up of a totality of dominant obligations, considered as rights by one party, as duties by the other, rigorously maintained by a specific mechanism of reciprocity and publicity

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691 inherent in the very structure of society... Their efficacy has its source in the rational appreciation of cause and effect by the natives, as well as in a certain number of personal and social feelings, such as ambition, vanity, pride, the desire to make the most of oneself by displaying one's talents, and also attachment, friendship, devotion and loyalty towards relatives...Legality represents one aspect of tribal life, one side of its structure rather than a totality of /228/ independent arrangement, a mechanism existing by itself...Legislation is a specific result of combinations which affect obligations, this combination making it impossible for the native to evade his responsibility without having to suffer the consequences" (p. 45). And Malinowski concludes his analysis with "an anticipation": "Research will one day discover almost everywhere that reciprocity, systematic influence, publicity and ambition are the principal factors which, in primitive legislation, impose obedience to its rules and prescriptions" (p. 51).

It is precisely this "anticipation" combined with the general interest in Malinowski's theory which has obliged us to dwell so long on this author.

We shall not comment on his idea of absolutely symmetrical organization and the dual structure of "savage" societies, the central axis of the whole system, on which contemporary anthropology has not spoken the final word. (38)

38. See C. Lévi-Strauss: Anthropologie structurale, chapter VIII, where the author asks: "Do dual structures exist?"

Nor shall we deny that a network of reciprocities exists in all societies, both archaic and modern, and that constraints which spring from them, especially since we have acknowledged them among the Sarakatsani in almost identical terms as those of Malinowski. Finally, we are absolutely convinced of the fact that individuals have personal obligations and responsibilities which they try to evade. However, reciprocity and constraint aside, we believe that there remains a gap which entities such as "vanity, pride, ambition, desire to make the most of oneself, attachment, friendship, devotion, loyalty, etc.", proposed by Malinowski, do not fill.

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121 671 If we address ourselves to these entities we run two risks: first, to confuse legal life with moral life in the sense that to conform to the entities enumerated means to obey certain social values sanctioned by general approval. It does not escape us that this approval implies a utilitarian aspect of which we shall speak in the next chapter. But this approval is not sufficient to insure absolute obedience by the persons concerned. Non-conformism represents "minor" dangers--the individual often is content with a minimum of consideration /229/ on the part of society.

Moreover, from the methodological point of view it appears that if one accepts this interpretation, one leaves the sociological field in favor of a psychologism limiting itself to "motivations" (a reality which only very partially explains our problem).

The second risk is based on the "motivations" in question. Ambition, pride, vanity, attachment, friendship, devotion, etc., are driving powers which can operate in two ways. They can uphold law, but they can also turn against it. For these motives, vanity for example or pride, have the power to launch conflicts and disagreements, sometimes very acute, between individuals and groups, and other individuals or other groups motivated by attachment, loyalty or friendship toward the interested parties may continue them and in doing so aggravate them and render them disastrous. Malinowski does not tell us why vanity and pride would be dominated by law and justice and not personal by self-esteem or egoism, nor why the authority of law would prevail over rebellious individualism. There is a point here which shows very well that psychology explains nothing if it is not used within concrete categories and framework.

121 671 681 This is why we believe that if we assume the mechanism of sanction and disguised coercion, we thereafter understand how individuals and groups obey law; we avoid confusion with morals and the introduction of extraneous psychological criteria into the true life of law. As a result, we base the latter on objective reality, the pressure that the "social milieu" exerts

/229 cont./

121 67 68 to force interested parties to obey; finally, we fill the gaps left by the acceptance of the principle of reciprocity, while reinforcing its effectiveness where it exists.

Remarks of a similar order may be made with respect to certain theories that follow the same line as the ideas of Malinowski. This is the case with P. Esmein, (39) who also quotes Hogbin, (40)

39. Le droit et ses sources, p. 6-7.

40. Le droit et l'ordre en Polynésie (in English).

with Lowie, (41) with Van Vollenhoven who, in the second volume of his work

41. Traité, p. 389.

Het adatrecht van Nederlandsch Indië, (42) /the custom law of the Dutch Indies/

[128] 42. The Dutch being inaccessible to us, we refer here to Josselin de Jong's discussion of this author, published in his study which we quote later on.

1918 /230/ (pp. 236 and 400) published after the appearance of Malinowski's book, modified the thesis proposed in his first volume, according to which law is made up of rules of behavior that are not codified and are accompanied by organized sanctions. His new thesis involves a double criterion, the mutual interaction of two customs: on the one hand, commendation and disapproval, and on the other-- intimately bound to the former--imperatives or prohibitions in the heart of the collective conscience and conduct. According to Josselin de Jong's interpretation, Van Vollenhoven did not give up the criterion of organized sanction but, under the influence of Malinowski, he enriched it. Thus the field of customary law is enlarged, but its boundaries remain uncertain. This observation by Josselin de Jong shows very well the weakness of this theory, which its author tries to overcome, without success. Furthermore, Van Vollenhoven does not tell us how and by what mechanism disapprovals and commendations are linked to the collectivity, so that no distinction can be made between opinion and morals on the one hand, and law on the other.

121 67 [114]

Thus J.- P. B. de Josselin de Jong: Customary Law /cited in English/, pp.

/230 cont./

121 3-7, aware of the confusion caused by the comparison of customary law with
671 the totality of customs, as well as by the absence of a definition of law strict enough to separate custom in general from our observations, and sufficiently broad to include the entire gamut of manifestations of the principle of legality, proposes eliminating the term "customary law." For, according to him, the difference between customary law and custom is one of form and not content. Thus, the authority of law is based on the (681) conviction that its existence is necessary and is based on the threat of sanctions.

121 If we understand this author's idea correctly, it seems to us that,
671 despite his effort to dispel the confusion, his positions only aggravate it.
681 The moment he finds that the source of the authority of law lies not in
114 sanction, a social reality and an objective and positive criterion, but in the feeling that it is useful, hence a psychological reality, the distinction between legal customs and other customs becomes impossible. Hence it is equally impossible to formulate a definition applicable to all manifestations of legality. For all the customary norms of behavior can be regarded as necessary, so that we are reduced to identifying custom in general with law, that is to say, /231/ to a repetition of the errors that we mean to combat. If we follow this author who, conscious of this risk, proposes to abolish the idea of customary law, we are left with no hope of an approach to non-evolved laws. Furthermore, the distinction between customary law and custom is not a distinction of form, but of nature. It seems to us that Josselin de Jong proposes the opposite, enticed by the fact that very often the same custom has two aspects, two potentials: one as a model of behavior, the other as a legal norm. The latter becomes real when sanction comes to its aid in seeking to enforce it. And at that moment, custom becomes purely legal and obviously acquires all the attributes of a law. If it does not appeal to sanction but if, at the moment it becomes reality, it imposes itself through other means, it presents the attributes of a model or behavior. These two situations are profoundly different. The difference is the same

1, /i.e., J.-P.B. de Josselin de Jong--Analyst/

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121 671 681 114 one that may be established between the moral imperative to respect the life of another and the rule of the penal code forbidding homicide. The content of the two commandments is the same, but their nature is different. This is exactly what Malinowski said when he stated that legality is more an aspect of tribal life than an independent arrangement.

Finally, if Josselin de Jong had sought to discover the real sanction associated with non-evolved laws, he would have avoided these slippery trails and would have entered the path leading to the definition of customary law.

121 671 208 We should now like to consider another theory which, like that of Van Vollenhoven, also addresses itself to public opinion. It is Hoebel's theory in The Law of Primitive Man /cited in English/. According to it, in case of a claim for damages or the restitution of stolen goods, or even punishment of the perpetrator of an illicit act, if the person responsible admits his responsibility and if public opinion expresses itself in favor of the plaintiff, this public opinion then represents a tribunal and the whole process takes on a legal character (p. 25). Hoebel adds: "Primitive law is characterized by the fact that the plaintiff, in demanding his right, seeks to satisfy both his own interest and the interest of society in general. Furthermore, primitive law shows a certain regularity" (p. 28). /English quotation not found on designated page/.

121 114 671 208 Hoebel here draws quite close to the problem but /232/ does not get to the heart of it. He individualizes laws and obligations, is aware of the role of the group in the resolution of states of conflict, but he does not tell us by what process "public opinion" is enforced. Therein lies the weakness of his theory. As we have shown elsewhere, sanction and disguised coercion differentiate absolutely between public opinion and what we have called the "sentence arising from a group." Public opinion expresses an attitude of the group with regard to a dispute. When this opinion is dominated by the idea of justice and when it is armed with means of sanction and coercion, even if it is not apparent, it represents a true sentence.

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121 114 67 Furthermore, Hoebel's idea concerning the regularity of primitive law is only partially true. One cannot expect regularity in only cases where one has to judge according to a spontaneous law based on equity, good sense and "ad hoc". If one accepts the position of Hoebel, one must exclude all these instances of juridical life.

121 67 We shall conclude these critical remarks by examining another category of theories which base non-evolved law on its relations either to the totality of social regulations or to morality.

121 67 68 Radcliffe-Brown, in his book Structure and Function in Primitive Society /cited in English/, and in agreement with R. Pound, notes first that law is part of social control, but is not identified with it. "The field of law," he states, "will therefore be regarded as coterminus with that of organized legal sanctions. The obligations imposed on individuals in societies where there are legal sanctions will be regarded as matters of custom and convention but not of law; in this sense, some simple societies do not have law, although all have customs which are supported by sanctions" (p. 212).

Thus we come back to the formalistic conception of law: law is every rule accompanied by legal sanction and legal sanction is every sanction imposed "by a constituted authority, political, military or ecclesiastic" (p. 208).

Let us try now to see where the assertions of this auther may lead. We take as an example "the negative organized sanctions" which, according to him, represent social reactions, social acts directed against persons open to social disapproval because of their behavior, and which /233/ are carried out according to traditional and recognized procedures. These acts consist of the exposure of the culprit in public, his total or partial exclusion from social life and the privileges that derive from it, the loss of his civil or religious rights or of his social rank. In addition to all this, one also finds confiscation of goods, or the infliction of corporal punishment--mutilation, flagellation, even capital punishment.

Now if one excludes law as the justification for these acts, for this punishment, what remains? Our author proposes morality and religion and

/233 cont./

121 671 681 above all the mechanism of social control (p. 208). But morality and religion can play this role only partially, as Radcliffe-Brown himself recognized albeit indirectly because, on the one hand, morality is not imposed by force without a change in their nature, and, on the other hand, punishible acts are not all related to religion. Finally, social [626] control is a very general function which involves several others and is therefore incapable of explaining this specific phenomenon.

Likewise, Radcliffe-Brown proposes that when sanctions are taken by individuals or groups against individuals and groups (vengeance, duel, blood revenge, etc.), under the control and with the approval of society, diffuse sanctions "of public opinion" /cited in English/ are involved. [114] This conclusion does not take us unawares. Since our author denies the legal character of the terrible sanctions enumerated above, applied collectively and according to a procedure determined in advance, it is natural that he should deny this character to these additional, more individualized sanctions.

[208] We have shown, moreover, that public opinion is not able to impose [626] sanctions exceeding disapproval.

121 671 The question therefore remains open. We believe that the perspective offered by our own position makes it possible to avoid the confusion of law with other social regulations and to avoid the paradoxical idea that societies can live without law when they do not have a specific judicial apparatus.

Marcel Mauss, for his part (chapter VII of his Manual), says: "In societies that ethnography singles out all legal phenomena are moral phenomena, without exception; which does not mean that all moral phenomena are necessarily legal in the strict sense" (p. 110). It remains to be seen how one can distinguish law from morality. /234/ "Legal phenomena," says Mauss, "are organized moral phenomena (p. 111)...We know the presence of morality and religion only from the presence of infraction and the idea of sanction. There is moral obligation...when there is diffuse sanction;

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there is legal obligation when there is a precise definition of obligation and a precise definition of infliction and for punishment... Obligation is simply more rigid and more legal in the case of law" (p. 112). That is not all. Mauss proposes still another criterion. "All laws are considered good by definition; then again, conformity to laws is good; it is necessary to social life. Everything that is in conformity is good, everything that is antagonistic to this conformism is bad. One would therefore recognize the moral and legal phenomenon by the presence of the idea of good and bad, previously defined and always sanctioned" (p. 112).

Now for Mauss the distinguishing criteria of law are three in number: precisely defined obligation; precisely defined infliction /of penalty/ and punishment, hence sanction; authority based on the good, including the value of conformity to rules. These ideas are not unknown to us. We have criticized them in the foregoing. Let us recall that up to a certain point we share them. However, we see ourselves obliged to remark that if one contrasts diffuse sanction appropriate to moral phenomena with definite sanction, fixed and organized, as appropriate to law, one leaves out manifestly legal phenomena such as obedience to arbiters which appears not to be enforced by sanctions and, what is worse, one risks linking these phenomena to morality. This is the case for example, for G. Gurvitch, when he gives priority to morality over law in patriarchal societies. But we shall speak of this in the next chapter.

We should like to conclude this theoretical test by pointing out that if we introduce into the arsenal of the theory of law the idea of disguised sanction and coercion we shall be equipped with a new, very effective criterion which permits us to follow paths that have hitherto been inaccessible.

It does not escape us that our argument is based only on one example and that consequently, before being more fully accepted, it must be tested in other social contexts.

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/235/ Nevertheless, testing it against the experience of the authors enumerated seems to reinforce the hope that disguised sanction and coercion also exist elsewhere, and that in any case it represents a good working hypothesis.

* * * *

Be that as it may, the solution of disguised sanction and coercion fits well into the Sarakatsani way of life. It would be difficult to imagine any other way. Faced with the dilemma of either not having organized justice (in view of the difficulties of living in small groups and nomadically), or of having one that is ineffective for lack of organization to maintain it, Sarakatsani society has chosen the solution described which meets the demands of the problem. It assures and guarantees the functioning of the social organization and it enforces order without burdening the organization of the group. Therefore the fit between this solution and the social framework seems perfect.

FINAL EVALUATION

Customary law, spontaneous law, structureless and disguised law, these are the aspects under which Sarakatsani law presents itself.

Issuing from collective sources, this law is also imposed by group agents which are the same as these sources, even in cases where ajudication and its execution are confined to individuals--representatives of the group which recognizes their perogatives, functions and efficacy.

Though intimately bound up with other social regulations, it retains its autonomy. And though exposed to the influence of magico-religious beliefs, above all when it is spontaneous, it clearly keeps its rational character.

Without abolishing the rights and responsibilities of individuals, it favors groups and cooperation, and disfavors individualism. Individual rights exist only when they are compatable with the "group" and in sympathy with the latter (43) --the "invisible government" according to the expression

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671 of P. Radin. (44)

44. P. Radin: Le monde de l'homme primitif, p. 221 f.

671 /236/ Its sanctions guarantee its functions, at once distributive,
681 preventive, restitutive, repressive. They are not taken from the law
182 of retaliation, as the instance of the vendetta particularly demonstrates.
(627) They are based on the idea of the defense of the social equilibrium or its reestablishment if it is temporarily disrupted.

Thanks to the mechanism of disguised coercion, it acquires, citing the expression of Mauss, (45)

45. Manuel, p. 110.

a character of strongly felt intimacy and community, for it can become involved at any moment in the smallest details of the life of our herders.

671 Seemingly simple, if not simplistic, but basically very complex,
182 Sarakatsani law meets the need for social control with extreme efficacy, which one would not dispute if one looked closely at its social context. For the dynamics of Sarakatsani law, transmitted in the social framework to a large extent give it its stability.

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CHAPTER IV

MORAL PHENOMENA AND MORALITY AMONG THE SARAKATSANI

577 Morality among the Sarakatsani is neither systematized nor doctrinal.
121 It is bound up with many aspects of their lives, in symbols, attitudes, conduct, habits, customs, language, cultural works, all of which serve as its vehicles. (1)

1. This phenomenon is not peculiar to the Sarakatsani alone. See A. Bayet: La science des faits moeurs, p. 17.

In attempting to recognize it and make it clear, the problem of an operational criterion of procedure arises. "In order to observe the moral phenomenon, one must also know what characterizes it, by what distinctive mark it can be recognized," Durkheim (2)

/242 cont./

599 The Sarakatsani may therefore take his choice between non-distinction, dishonor and honor. These are the limits within which he may deploy his moral activity.

599 156 These alternatives have their justification in the risks that one runs socially by the choice one makes. By choosing non-distinction the subject injures only himself. By opting for infamy (though this may seem paradoxical), that is to say, by violating fundamental rules or denying the "minimum morality," the individual or the group endanger the collectivity which then would react against them with severity. By prefering honor one becomes a pillar of social life, for, thanks to the conduct and example one offers to all, one contributes to its solidity. Honor is the reward to those who have embodied Sarakatsani morality. They become "morality in person."

599 671 681 /243/ As for the line of demarcation separating morality from law, the foregoing remarks show that the major requirements constitute the common threshold. It is in terms of the importance of the infraction committed, therefore the importance of the risks run by non-conformity, that the foregoing passage, analyzed from the standpoint of legal reactions will be understood, and that the mechanism of sanction and coercion is activated. [626] Thus, the major moral requirements and law may intermingle, the difference residing in the concrete fact of the intensity of social repression: either society is content simply to scorn the culprit or it decides to react more violently.

599 626 671 It follows that morality, as social control, occupies a prominent place among the Sarakatsani, though it cannot be placed above the law. Despite its rigidity, especially with reference to major requirements, it comes after law, though it complements and aids the latter by its own prestige.

599 181 671 The regulation of the actions of these herders, tough, intrepid, independent human beings, true fighters ceaselessly striving to conquer innumerable difficulties and obstacles, requires means more powerful than morals, hence

/243 cont./

law, the supremacy of which one cannot deny. (9) clearly, the morality

9. G. Gurvitch: Ibid., p. 199, states an opposite opinion not, it is true, with regard to the Sarakatsani but in relation to patriarchal structure in general. It is difficult for us to accept this opinion based on the consideration that Hebraic society of biblical times, Homeric society, the latifundia, the zadruga etc., are ruled by morality. It seems to us that Deutoronomy, the scene of the chaining of Achilles, the very ancient Roman law, etc., as well as the type of life of these societies shows the opposite.

of the Sarakatsani is nowhere in contradiction with their other social regulations, with the rules deriving from religion, magic, knowledge etc., and as a result it never creates problems of conscience or behavior, nor of internal social rupture. On the contrary, being perfectly integrated in a perfectly coherent system, it offers the Sarakatsani a solid as well as an indispensable foundation for safeguarding their traditional social life.

/244/

PART THREE

/245/IN THE PRESENCE OF THE MYSTERIOUS, THE WONDERFUL, THE BEAUTIFUL

/245/ "In vain experience says 'it is false' and reason says 'it is absurd,' humanity clings all the more to absurdity and error."

This phrase by Henri Bergson (1)

1. See Les Deux Sources, p. 105.

could serve as the motto for the title of this section if the point of view proper to anthropology did not impose on us the duty not to criticize but to explain "the absurd" and "the error," to recognize them as stages through which humanity passes in its epic course toward the conquest of the world by the mind. (2)

2. See above, Chapter III.

In this third part we shall try to study in detail how the Sarakatsani,

182 /382 cont./
291 in family or society symbolic ornaments bringing about fecundity among
261 women).
181

182 Nevertheless, every economico-social system has need of another
691 system of rules which will socially guarantee the first. The Sarakatsani thus introduce their law first of all, based on custom, equity and common sense, which means that this law, along with crystallized rules, includes spontaneous and ad hoc prescriptions. It sanctions the fundamental organizing rules of their life and the functioning of their social and economic institutions which it makes their own. Its salient characteristic is to favor cooperation and its results, and to combat individualism.
182 Its chief concern is to protect kinship and herding by its penal provisions;
691 that is why it does not hesitate to threaten miscreants with capital
681 punishment (the vendetta, for example). In any case, and in order to impose itself, it introduces a mechanism of ajudication, of sanction and coercion, sometimes not apparent, which are in keeping with isolation (not to resort to the justice of "the foreigner") and to the necessity of showing itself effective, though there does not exist among them a specific legal
(626) apparatus. The principle of conformity finds its best means of expression here, while enforcing the mechanism in question. On the other hand,
182 morality, by its mechanism of honor or dishonor maintains all the rules
591 enumerated, integrating them into its principal values such as tradition,
181 family, chastity, community, bravery and independence, which basically represent merely the main ideas of Sarakatsani life elevated to the level of morality.

There is nothing astonishing in this state of affairs. The moment a society accepts and proposes a certain number of fundamental principles on which it bases its life, it is altogether normal that these principles be raised to moral values. The contrary would result in meaninglessness.

183 /399 cont./
578
182 In the second place, there is constraint in the general sense of
626 the term. It appears first in the influence of the Tséligas, the head,
[474] who, to the extent that he has a strong personality and a true capacity
[554] to govern, is in a position to impose on his subjects the traditional
norms by which the family group functions and thus to safeguard its
cohesion and its content /sic: "son conteny"/. Constraint manifests
[691] itself next in law and morality, the two aspects of group constraint
[577] which, armed with social support, act sovereignly in favor of the socio-
cultural status quo. The analysis of the way they are enforced has
demonstrated their effectiveness.

578 In the third place are the idealization and mythization of the
182 "Sarakatsani condition," the elevation to the rank of supreme value and
183 myth every cultural solution to each specific problem. No matter that
the application of these solutions, coldly considered, entails priva-
tions, concessions, and demands abnegation or sacrifice! In psychoanalytic
terms, one might call this phenomenon sublimation.

578 Religion for its part, with its teaching and traditions that
799 prescribe obedience to headmen, to elders, and justify the subordination
183 of the woman, while sanctioning the traditions by salvation, also supports
182 the social edifice by determining behavior and its motivation, that is
to say, by determining collective attitudes.

578 Finally, we encounter the mechanism of "obligation-compensation"
695 /400/ of which we have spoken above, (2)
182
2. See above, p. 205-206, etc.

and to which we should like to add some details--first of all terminolog-
[121] ically. The notion of alienation is taken here in its primitive and
legal meaning (Lalande) according to which alienatus is not free. Thus,
it is not identical with mental alienation or with alienation according